

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**





# 77-2007

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P/S

To be argued by  
PHYLIS SKLOOT BAMBERGER

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delivered  
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for

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

DANIEL WHITE,

Petitioner-Appellant,

-against-

EUGENE S. LEFEVRE, Superintendent,  
Clinton Correctional Facility,

Respondent-Appellee.

Docket No. 77-2007

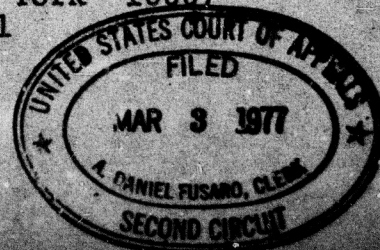
## BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER  
OF THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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DANIEL WHITE,  
Petitioner-Appellant,  
-against-  
EUGENE S. LEFEVRE, Superintendent,  
Clinton Correctional Facility,  
Respondent-Appellee.

BRIEF FOR APPELLANT

### QUESTION PRESENTED

Whether counsel's illness during the pretrial hearing on the admissibility of appellant's confession made him unable to present appropriate and important legal arguments to the court and deprived appellant of adequate representation by counsel.



STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (The Honorable Robert L. Carter) entered on October 15, 1976, denying a pro se petition for writ of habeas corpus (28 U.S.C. §2254) challenging a judgment rendered in Supreme Court, New York County, convicting appellant Daniel White for murder in the first degree.

On December 1, 1976, Judge Carter granted a certificate of probable cause, and this Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. Prior Proceedings

On November 30, 1970, appellant was convicted of murder in the first degree for the stabbing death of James Allen which occurred on July 18, 1969, on Delancy Street, not far from the Seventh Police Precinct. Appellant was subsequently sentenced to a term of 20 years to life imprisonment. After an appeal to the Appellate Division, First Department, the conviction was affirmed (39 A.D.2d 1018 (1972)), and leave to



appeal to the Court of Appeals was denied.

Appellant then filed a petition for writ of habeas corpus in the Southern District of New York, alleging that he was denied his right to adequate representation by counsel at the pretrial hearing on his motion to suppress because his lawyer was ill at the time of that hearing. The writ was dismissed for failure to exhaust state remedies (The Honorable Charles L. Briant). Subsequently, appellant filed two petitions for writs of error coram nobis, one in New York County, the other in Clinton County. Both writs were denied, and the second order was affirmed by the Appellate Division, Third Department, on April 24, 1975.

Appellant then filed a new petition in the Southern District of New York, again alleging that his counsel was unable to adequately represent him at the suppression hearing.

#### B. The State Proceedings

On September 14, 1970, appellant appeared in court with his attorney, Manuel Steinberg, for argument on a motion to dismiss for lack of speedy trial (5M-11M\*). After argument was completed and the motion denied (10M), defense counsel asked that the prosecutor state whether a confession had been

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\*The minutes of all state proceedings are bound together in two volumes. Pages of pretrial proceedings are denoted by a numeral and a letter; pages of the trial are denoted by a numeral.



made so that a Huntley\* hearing might be held (11M). The prosecutor then advised counsel that statements made by appellant to police officers would be introduced at trial (11M).

On the morning of October 20, 1970, appellant's case was called for disposition of preliminary motions (21M). The case had been on the ready calendar from October 6, 1970, and had been transferred to Judge Fraiman for pretrial motions and trial. At that time, the prosecutor advised the judge that Mr. Steinberg was at the dentist but would be available at 2:00 p.m. (16M).

At 2:00 p.m., Steinberg appeared in court and stated:

If your Honor please, I am ready, prepared for trial, been prepared for trial and ready for trial in this case for approximately -- many months. Unfortunately yesterday I broke a couple of teeth on my bridge. I was up all night. I have been having Darvon. I was in a dental chair until 1:30 this afternoon. I pretty much can't stand on my feet right now. I am certainly not in a position to proceed with this this afternoon by any stretch of the imagination.

(18M).

There was an initial reluctance to grant any adjournment (19M, 20M, 21M) but, due to further requests -- indeed pleas -- by defense counsel (21M-23M), the court granted an adjourn-

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\*See People v. Huntley, 15 N.Y.2d 72 (1965). Under New York procedure, a hearing pursuant to Huntley goes to any challenge to a confession. People v. Sanchez, 20 Cr.L.Rep. 2441 (Sup.Ct., N.Y.Co. 1977).



ment for two days (24M).\*

On October 22, 1970, Steinberg returned to court and explained that after his appearance on October 20 he had suffered further injury to his dental work:

When I left this court, the first bite that I took at dinner, I broke the partial, and I had to go back up to Yonkers to the dentist's home again. I was in the chair for approximately an hour and a half. I submit to the Court that within the past six and a half or seven days I have been neither eating nor sleeping.

My physical condition is such that my ulcer has been acting up violently. I think it is possibly because of my aggravation and general condition because of my teeth.

My kidney has been acting up. I have been living on Darvon and aspirin. Last night I didn't fall asleep until six-thirty this morning.

I submit to the Court that I am not clear-thinking. I am not in any physical condition at this point to go into a murder trial which should take at least ten days or two weeks.

(33M).

The court asked for medical evidence of counsel's condition. Counsel indicated that he did not have such evidence, stating, "I am an officer of this court" (35M). He asked that other counsel be assigned (35M) or that another be assigned to handle the case with him (42M-43M). Both requests were denied, and the hearing on the admissibility of the confession

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\*Despite the court's reluctance to give any delay even though defense counsel was ill, when the court finally consented to an adjournment, it was for two days because the assistant district attorney had to attend a conference on the second day.



proceeded.

At the hearing, police officer Andrew Kopcha testified on direct examination that he had been called out of the precinct house by the captain, who was kneeling over a man lying on the ground and covered with blood (19). The captain instructed Kopcha to take appellant, who was standing nearby, into the station house (19). Kopcha, with another patrolman, brought appellant to the back room of the station (20). About five minutes later, Detective John Keenan, with Kopcha, took appellant up to the second floor of the station house to the squad room (21), where Kopcha was handcuffed to a chair (22). Kopcha was then left alone with appellant for an hour (34) until 4:00 p.m., when he was relieved by a Lieutenant Kelly (22).

Kopcha testified that he did not strike, hit, punch, or injure appellant while the two were in the room together (22). Kopcha also testified that he did not tell appellant of his rights (24; see also 35).

On cross-examination of Kopcha, he testified that he did not interrogate appellant, but had "idle conversation" with him:

I didn't interrogate him. I said I had idle conversation with him.... It was about the thing, but not in the form of interrogation.... I didn't question him. I just spoke to him, idly. "What is your name? What happened?"

(33).

Kopcha acknowledged that he got admissions from appellant (33,



34). Kopcha left duty at 4:00 p.m.

Detective John Keenan then testified at the hearing that he advised the defendant of his rights and questioned him (39). The advice included the right to remain silent and to have an attorney present (41). According to Keenan, appellant stated that he understood his rights (41). Keenan asked appellant if he wanted to answer questions without an attorney, and appellant replied affirmatively (42). Keenan advised appellant he was under arrest for James Allen's death and, according to Keenan, appellant stated he was glad Allen was dead (42). Appellant allegedly said he was in a dispute with two men who were in his apartment to move furniture and that he cut one of them in the apartment (43).<sup>\*</sup> Keenan then testified that a Detective O'Brien arrived, that appellant inquired whether Allen was dead, that O'Brien said "yes," and that appellant said "good." O'Brien asked appellant to identify the knife involved, and appellant did so (43-44).

On cross-examination, Keenan testified that the interrogation of appellant took about ten minutes (56). Counsel explored extensively the warnings given to appellant (66-76).

The defense presented no evidence at the hearing. In conclusion, defense counsel argued that the notice of rights given to appellant by Keenan was inadequate (82) and that Kopcha had never advised appellant of his rights (83). The prosecutor argued:

... [T]he issue, then is merely whether the proper Miranda warnings were given to this defendant and whether he waived his rights. The uncontradicted testimony is that the

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<sup>\*</sup>The evidence at trial was that Allen was the moving truck driver and that he was stabbed in the street and was not in the apartment.



rights were read to the defendant; he indicated that he understood those rights; that he made a statement thereafter. The rights, I submit, are fully competent in compliance with Miranda, go beyond even beyond the necessity of the Miranda warning.

(P.86-87).

The court concluded that the confession was voluntary and that Miranda was complied with (87).

At trial, Keenan testified to the notice of rights he had given appellant (412) and repeated the statement appellant had allegedly given (413-414).

The State also called Detective Edward O'Brien to testify to statements made by appellant. Defense counsel objected to O'Brien's testimony, on the ground that any statement given to O'Brien had not been the subject of the Huntley hearing:

I am going to object to any conversations had with this defendant and this detective on the ground that in the preliminary hearing there was no testimony adduced by this officer in connection with any alleged admissions, statements, or impressions made by this defendant; and he is precluded at this point from offering any evidence on any statements or admissions.

The assistant district attorney responded:

Your Honor, I submit that there was testimony at that hearing concerning a conversation between this detective and this defendant, and that's what I intend to introduce.

(450).

Counsel argued that Detective O'Brien should have been called at the pretrial hearing. The objection was overruled when it



was revealed that O'Brian was in the room at 4:00 p.m. with Keenan interrogating appellant (451). O'Brien testified that appellant asked, "Is the motherfucker dead?", and that, on questioning by O'Brien, appellant identified the knife used (452).

On cross-examination, O'Brien revealed that he did not advise appellant of his rights (459).

Other evidence for the State came from Freddie Garner. Garner testified that he, James Allen, and another man named Francis were the crew who were to move appellant's furniture. Allen was the driver and, except for the first trip to the apartment, remained in the truck. According to Garner, appellant complained that he and Francis were not working fast enough and put a knife to Francis's neck (145-146). Garner reported to Allen what had occurred, and then appellant came out of the house (151). Allen inquired about what had happened. Appellant made no response, and finally said, "I'm going to kill you" (151). Appellant pulled out a knife, pushed Allen back, and stabbed him "down low" (152).

In his summation, the prosecutor argued that the statements showed that appellant was guilty (591).

#### C. The Opinion Below\*

Judge Carter, in his opinion denying the petition for writ of habeas corpus, concluded that the standard for find-

\*The opinion is B to appellant's separate appendix.



ing counsel to be incompetent was whether the representation by counsel was so inadequate as to shock the conscience of the court and make the proceedings a farce and mockery of justice. The judge concluded that counsel's representation, despite his claim of illness, "did not even begin to approximate the level of incompetence which must be demonstrated in order to overturn appellant's conviction."



### ARGUMENT

COUNSEL'S ILLNESS DURING THE PRETRIAL HEARING ON THE ADMISSIBILITY OF APPELLANT'S CONFESSION MADE HIM UNABLE TO PRESENT APPROPRIATE AND IMPORTANT LEGAL ARGUMENTS TO THE COURT AND DEPRIVED APPELLANT OF ADEQUATE REPRESENTATION BY COUNSEL.

During the course of the Huntley hearing, which included the question of both the voluntariness of the confession and whether the police officers complied with Miranda v. Arizona, 384 U.S. 436 (1966), it was plainly revealed that appellant gave two statements to the police officers. The first was given to Patrolman Kopcha, the second to Detective Keenan. Both statements were made while appellant was in custody on the second floor of the Seventh Precinct. It was also established by the State's own evidence that the first statement was given to Kopcha without any notification to appellant that he could refuse to answer any questions asked by the police officer. In fact, Kopcha made it clear that he did not consider his "idle conversation" an interrogation, and therefore did not believe he had to give any notice of rights under Miranda to appellant. Thus, that statement was illegally obtained. Kopcha was relieved of his duties by Lieutenant Kelly, who was apparently immediately succeeded by Detective Keenan, who then gave appellant notice of his rights and asked appellant whether he wanted to make a statement. Within ten minutes, appellant repeated to Keenan the same statement he



had just moments before given to Kopcha.

This second statement, occurring virtually immediately on the heels of the first, illegal one, in the same room, after change of the patrolman doing the interrogation, was tainted by the prior illegality, and thus was illegal and inadmissible. Westover v. United States, 384 U.S. 436, 494 (1966); Fisher v. Scafati, 439 F.2d 307 (1st Cir. 1971); United States ex rel. Stephen J.B. v. Shelly, 430 F.2d 215 (2d Cir. 1970); Harney v. United States, 407 F.2d 586, 590 (5th Cir. 1969); United States v. Pierce, 397 F.2d 128, 131 (4th Cir. 1968); see United States v. Knight, 395 F.2d 971, 974 (2d Cir. 1968), cert. denied, 395 U.S. 930 (1969).

Appellant, having spoken to Kopcha and having incriminated himself, could have believed that silence and a refusal to respond would have been useless. United States v. Pierce, supra, 397 F.2d at 131. As this Court said in the successful challenge to the state conviction in Stephen J.B.:

Whether we characterize the rationale as the "cat-out-of-the-bag" theory or not, the simple, likely conclusion is that when a suspect, in the rapid sequence of events present here, has already admitted his guilt, he will be far less likely to give intelligent consideration to later requests to waive his [rights] ... since he will regard them as meaningless.

Id., 430 F.2d at 218.

The Miranda notice given by Keenan did not break the chain of primary illegality, thereby eliminating taint. Appellant was not told that his earlier statement was inadmis-



sible, or that it would not be used against him. Indeed, the notice was to the contrary, for appellant was told that any statement could be used against him.

Despite this clear evidence that the first statement had been taken unconstitutionally and in violation of Miranda, and that the second was tainted by the primary illegality, counsel did not argue this theory to the trial court. It can only be assumed that counsel's failure to make this critical and meritorious argument to the court was the result of his illness. From the record, it is apparent that the question of taint did not surface until the evidence was presented at the hearing. While defense counsel knew a month prior to the hearing that the State would seek to introduce statements given to the police officers, the record does not reveal that he knew the contents of the statements, the procedures by which the statements were taken, and the sequence in which they were taken. Only the evidence given at the hearing raised this issue. But at the time of the hearing, counsel was very ill.

At trial, it again became apparent that counsel had missed an opportunity to challenge the procedures by which appellant's statements were taken. The assistant district attorney called as a witness at trial Detective O'Brien, who was to reveal a third statement made by appellant as well as his identification of the knife as a murder weapon. Counsel objected, saying he did not remember any mention of O'Brien



at the hearing and on the ground that O'Brien had not testified at that proceeding. In fact, at the hearing Keenan had revealed O'Brien's interrogation of appellant. Surely, experienced counsel who was not ill would have realized the contents of Keenan's testimony and demanded that O'Brien be called so that he might be examined as to whether he coerced appellant, whether he gave notice of rights, whether he knew of the first illegal statement. Counsel, however, apparently did not realize the contents of Keenan's testimony about O'Brien, for he did not even remember it later.

On the facts as revealed, counsel's illness must have been the cause of his failure to make the appropriate arguments. He stated that he was prepared for the case and had been ready for months and had made a variety of pretrial motions. Indeed, he raised the challenges to the confessions. Any conduct by counsel that was based on his preparation prior to the date of his illness was thoughtful and appeared to be in compliance with his responsibilities as counsel. When, however, an instantaneous appraisal of new information was critical for presentation of an issue not previously in the case, counsel did not make the judgments required of trial counsel. Given counsel's general level of representation, it can only be assumed that it was his illness that prevented his making new arguments to the court.

Based on this necessary conclusion, it must follow that appellant was not adequately represented by counsel at the



hearing. Up to now, this Court has applied the "sham and mockery" standard for evaluating defense counsel's performance in the representation of his client. This standard, relied upon by Judge Carter, to deny the writ and reaffirmed many times in this Circuit (see Rickenbacker v. The Warden, Doc. No. 76-2036, slip op. 1063, 1070 (2d Cir., December 22, 1976), is stated to be representation

... such as to make the trial a farce and a mockery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice as grounds for the issuance of a writ of habeas corpus.... A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice.

What this test does is to view the trial as a whole to determine whether the entire proceeding is unacceptable to the court because counsel has totally failed in his function. The broad scope of the test leaves irremediable an error or mistake made by a lawyer who is generally competent and adequate or even excellent even if the error affects a substantial right of the accused, the way in which the trial will proceed, or the evidence introduced. The present test places the emphasis on a subjective evaluation of counsel's general abilities and focuses on a condemnation of the attorney as a professional. Indeed, it is possible that the standard had created reluctance on the part of the court to find that an attorney with a generally fine reputation is inadequate in a



particular case.\*

The question that should be asked is whether the attorney's conduct in a specific issue in a particular case was adequate under the circumstances. No broad condemnation need be involved, for there is recognition that even the best attorney can have a bad day and make a mistake which should be corrected. Indeed, what counsel tried desperately to do in this case was to convince the court that, despite his preparation, experience, and expertise, he could not at that moment fulfill his responsibility because of his illness. The court rejected that assertion and compelled counsel to proceed.

A test based on consideration of the attorney's specific acts in a particular case should be adopted by this Court. Indeed, there is a suggestion that the time for reconsideration of the Court's rule has come (Rickenbacker v. The Warden, supra, slip op. at 1071 (majority opinion of Smith, J.); slip op. at 1074 (dissenting opinion of Oakes, J.)).

The District of Columbia Circuit has articulated a rule which, as that Court explained, would require examination of the specific and particular events in the proceedings. The

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\*An example of such a result is Labat v. Louisiana, 350 U.S. 190 (1955), where 76-year-old assigned counsel, who spent several months of the year in bed, was found competent although he failed to make a timely challenge to the jury under state law in a case in which the black defendant was charged with rape. The Court noted that counsel was a well-known lawyer of 50 years' experience who had been praised by the Bar Association with no evidence of incompetence.



rule requires the reasonably competent assistance of counsel acting as the defendant's diligent and conscientious advocate.

United States v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir.

1973). In the explanation of the standard, the Court said:

Counsel should promptly ... take all actions necessary to preserve [his client's rights.] Many rights can only be protected by prompt legal action.

Id. at 1203.

One of the specific rights listed by the court is the right against self-incrimination. The court then goes on to state:

Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. The Supreme Court has noted that the adversary system requires that "all available defenses are raised" so that the Government is put to its proof.

Id. at 1204.

In this case, counsel could not take all the action necessary to preserve the rights of his client for he did not make the necessary legal arguments. Further, he did not undertake the appropriate factual investigation, for his cross-examination of Keenan did not focus on whether Keenan knew of the prior statement or whether Keenan took advantage of its existence. Further, counsel did not call appellant to the stand to enable him to explain whether he gave the second statement because an earlier one was already with Patrolman Kopcha.

The Fifth Circuit in United States v. Fessel, 531 F.2d 1275, 1278 (1976), reiterated the standard in effect in that



Court for seventeen years, which also emphasized individual and specific conduct by counsel: is he reasonably likely to render and is he rendering reasonably effective assistance?\*

On this test, the Court found that counsel's failure to seek appointment of a doctor under the Criminal Justice Act to present a competency defense was not effective assistance of counsel. In this case, counsel explained that he could not render reasonably competent assistance, and his failure to argue the legal issue presented by the evidence demonstrated that he had properly evaluated his condition.

Even the more general statement in Moore v. United States, 432 F.2d 730, 736 (3d Cir. en banc 1970), reflects a requirement that lawyers act competently as to each decision: exercise of the customary skill and knowledge which normally prevails. The issue of taint is one of the catalogue of problems that counsel must be alert to in pretrial motions. See Wong Sun v. United States, 371 U.S. 471 (1963); Brown v. Illinois, 422 U.S. 596 (1975). However, as here, it is often revealed only by the evidence presented in the pretrial hearing, and requires that the skilled attorney be alert so that he can develop the issue factually and legally.

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\*The same test is used in the Sixth Circuit. United States v. Toney, 527 F.2d 716, 720 (1975); Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974). For a history of the Fifth Circuit rule, see Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974).



The inappropriateness of this Circuit's rule is amply demonstrated by this case where counsel was aware that the level of his representation would not meet with his own standards of representation. Despite his objections, the judge compelled him to proceed and the difficulties he perceived indeed came to pass. The admission into evidence of the confession was obviously damaging to the appellant's case and must have played a role in the juror's deliberations. The order below, based on a standard of law which should be rejected, must be reversed.

#### Conclusion

For the above-stated reasons, the order should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

March 3, 1977.

I certify that a copy of this brief ~~and appendix~~  
has been mailed to the Attorney General of the State  
of New York.

Pyles S. Brown